

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:20-cv-00598

Herbert Vanderkinter,
Petitioner,

v.

Sheriff, Smith County,
Respondent.

ORDER

This civil action was referred to United States Magistrate Judge K. Nicole Mitchell pursuant to 28 U.S.C. § 636(b)(3). Judge Mitchell issued a report on March 29, 2021, recommending that petitioner's habeas corpus proceeding be dismissed, without prejudice, for petitioner's failure to comply with an order of the court. Doc. 5. The magistrate judge further recommended that petitioner be denied a certificate of appealability sua sponte. No objections have been filed.

The magistrate judge's recommendation flowed from a November 10, 2020 deficiency order. Doc. 3. That order directed the petitioner to either submit the requisite filing fee of \$5.00 or an application for leave to proceed in forma pauperis. Petitioner has never filed the filing fee nor an application to proceed in forma pauperis.

The Fifth Circuit has explained that when a letter is properly placed in the United States mail, a presumption exists that the letter reached its destination in the usual time frame—and was actually received by the person to whom it was addressed. *See Faciane v. Sun Life Assurance Co. of Canada*, 931 F.3d 412, 420-21, 421 n.9 (5th Cir. 2019). Because the deficiency order was mailed to petitioner months ago, and because he has failed to respond, petitioner has failed to comply with a court order.

Having reviewed the magistrate judge's report, and being satisfied that it contains no clear error, the court accepts its findings and recommendation. The court orders that the above-styled habeas proceeding is dismissed, without prejudice, for the failure to comply with an order of the court. The court further orders that petitioner is denied a certificate of appealability sua sponte—which refers to an appeal of this case only and does not prevent refiling.

So ordered by the court on May 17, 2021.

A handwritten signature in black ink, appearing to read "J. Campbell Barker", is written over a horizontal line.

J. CAMPBELL BARKER
United States District Judge